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No. 383

In the Supreme Court of the United States

OCTOBER TERM, 1957

DAVID CENTER, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 6–13) is reported at 244 F. 2d 207. The findings of fact and conclusions of law entered by the District Court (R. 302–312) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1957 (Pet. App. 14). A timely petition for rehearing (R. 334–6) was denied on May 29, 1957 (R. 341). The petition for a writ of certiorari was filed on August 19, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the court below properly held that petitioners' failure first to present their claims to the General Accounting Office precluded their allowance under 28 U. S. C. 2406 as counterclaims against the Government in a suit brought by the United States against petitioners.

STATUTES INVOLVED

28 U. S. C. 2406 provides:

> In an action by the United States against an individual, evidence supporting the defendant's claim for a credit shall not be admitted unless he first proves that such claim has been disallowed, in whole or in part, by the General Accounting Office, or that he has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the General Accounting Office by absence from the United States or unavoidable accident.

Subsections (d) and (g)[1] of Section 204 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 389, as amended, 40 U. S. C. 485) provide in pertinent part:

> (d) Any Federal agency disposing of surplus property under this title (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to per-

[1] These subsections, originally (c) and (f), were redenominated as (d) and (g) when a new subsection (b) was added as of August 31, 1954 (68 Stat. 1051, 40 U. S. C. 485).

mit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn.

* * * * *

(g) Where credit has been extended in connection with any disposition of surplus property under this title or by War Assets Administration (or its predecessor agencies) under the Surplus Property Act of 1944, or where such disposition has been by lease or permit, the Administrator shall administer and manage such credit, lease, or permit, and any security therefor, and may enforce, adjust, and settle any right of the Government with respect thereto in such manner and upon such terms as he deems in the best interest of the Government.

STATEMENT

On March 7, 1952, the Government filed suit seeking to collect moneys due and owing from petitioners in connection with the disposal of aluminum scrap (R. 1–6). The complaint contained counts for $101.10, $27,967.90 ($38,531.65 less admitted credits), $3,528.77, and another which was abandoned prior to trial (R. 1–6, 26, 31, 303). Petitioners contested liability only as to the $101.10 count (R. 25–26, 31–32, 303), but interposed as counterclaims five "setoff claims" totalling $33,251.56, also arising from surplus aluminum disposal transactions.

The District Court ruled against petitioners on all but two of the counterclaims, and, as to those two, the

court held the claims to be meritorious and assertion thereof not barred by petitioners' failure to comply with 28 U. S. C. 2406. The District Court held that the failure to file the claims with the General Accounting Office, as provided by 28 U. S. C. 2406, "was not fatal" since the claims were filed with the Claims Division of War Assets Administration and "denied * * * upon their merits" (R. 309–312). The court said that Section 204 of the Federal Property and Administrative Services Act of 1949 (40 U. S. C. 485, pp. 2–3, *supra*) authorized the agency disposing of surplus property to settle claims administratively, and that the claims were filed with and denied by the War Assets Administration's Claims Division (*ibid.*).

Both parties appealed (R. 314–315). The court below reversed, holding that Section 204 of the Federal Property and Administrative Services Act of 1949 did not vest jurisdiction in the surplus disposal agency to pass on claims for unliquidated damages for breach of contract such as are here involved, and, consequently, petitioners' failure to submit their claims to the General Accounting Office precluded their assertion here as counterclaims (Pet. App. 7, 13).

ARGUMENT

Contrary to petitioners' claim, the holding of the Court of Appeals, that in the particular circumstances of this case the submission of petitioners' counterclaims to the Comptroller General was a prerequisite to their subsequent assertion, is not inconsistent with *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, the case principally relied on by petitioners (see Pet. 4–6).

Indeed, the decision below is fully consistent with the guiding principles there formulated. Accordingly, there is no need for further review by this Court.

1. In *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, the petitioner had presented to the Comptroller General for allowance certain claims arising from contracts with the United States Shipping Board Emergency Fleet Corporation, apparently so as to enable the petitioner to assert them as a credit should the United States sue on the contracts as threatened. See R. S. 951, former 28 U. S. C. 774 (1940 ed.), from which 28 U. S. C. 2406 is derived.[2] Upon the Comptroller General's refusal to consider the claims on the ground that the duty and the power to consider the claims was vested in the United States Shipping Board, rather than him, the petitioner sought mandamus to compel the Comptroller to pass upon the claims. In affirming the dismissal of the writ, this Court, while reading R. S. 951 as precluding the interposition of a claim as a credit unless previously disallowed by an accounting officer of the Government authorized to settle and adjust the claims, ruled that the Comptroller General had no authority to pass on the claim in the particular circumstances since (1) the Fleet Corporation was a private corporation whose financial transactions were not passed upon by the General Accounting Office, and (2) the Shipping Board was authorized to "adjust, settle, and liquidate all matters arising out of or incident to the exercise * * * of

[2] Provisions of the so-called "credits" act of March 3, 1797, c. 20, 1 Stat. 514–515, are the origin of R. S. 951.

any of the powers or duties conferred or imposed" by the provisions of law under which the contracts had been made. 275 U.S. at 10.

The court below meticulously followed *Skinner & Eddy* here. Since the War Assets Administration, and its successor, General Services Administration, are agencies within the Executive branch of the Government subject to financial supervision by the Comptroller General, the Court of Appeals undertook to ascertain whether Congress had authorized them to settle and adjust claims arising from surplus property disposal of the type on which petitioners sought recovery.[3] Inasmuch as the pertinent language of Section 204 of the Federal Property and Administrative Services Act of 1949, pp. 2–3, *supra*, does not contain a broad authority comparable to that in *Skinner & Eddy*, the court below had to determine whether the claims came within the authority provided by Section 204. Since "the precise nature of the claims" were "for damages for lost profits for a breach of a contract of sale" (Pet. App. 10), the court correctly held that they were not within the "limited authority" conferred by subsection (d) to make "refunds to purchasers when any disposition is rescinded

[3] In this connection, the court below noted that: "The only exceptions * * * [to] the rigid requirements of section 2406 are in instances in which legislation authorizes the adjustment and payment of the claims * * * by an independent government corporation or other agency. * * * Obviously if an agency of the Government has no power to allow the claim there is no reason for permitting a submission to it to satisfy the requirement that it be submitted to the General Accounting Office." [Pet. App. 11–12.]

or does not become final, or payments for breach of any warranty" (*ibid.*). The court further noted (Pet. App. 11):

> It is apparent that the authority to make *refunds* refers to the repayment of the purchase price received from vendees in case the sale is later rescinded or any warranties that had been made in its connection had been breached. This is quite different from authority to settle an unliquidated claim for damages for lost profits where a breach of a contract of sale is involved on which the purchaser had not yet made any payments to the Government.

Similarly, the Court of Appeals correctly read subsection (g) as "authorization * * * to permit the Administrator to settle the claims of the United States arising out of credits authorized under the War Assets Administration's operation, but not to make payments on claims for breach of contracts asserted by debtors of the Government." (Pet. App. 11.)

Thus, since, as the court below said, Section 204 (d) of the 1949 Act did not create a special fund or deposit "for the disposition of unliquidated claims for breach of contract * * * and nothing in [it] * * * itself created such fund or granted such authority * * *,"[4] the Court of Appeals properly con-

[4] This reading of Section 204 (d) is buttressed, as the court pointed out (Pet. App. 12), by the administrative construction given by WAA and GSA to its authority when denying the claims. See Defendant's Exhibits 18, 20, 23, 24 and 25. And while this reading of the administrative rejection is at odds with that of the District Court, the court below was at liberty to disregard the trial court's conclusion since the perti-

cluded that "Congress has therefore not authorized any exception here to the requirement that any counterclaim or set-off of the nature of an unliquidated claim for damages for breach of contract must first be submitted to the General Accounting Office and be disallowed before being available to reduce the amount of the Government's claim." (Pet. App. 12–13.)

2. The purported procedural dilemma pressed upon this Court by petitioners (Pet. 5) is at best contrived. If there were any question as to whether a particular Government agency, other than the Comptroller General, has authority to settle and adjust specific categories of claims, then the claimant could easily file his claim with both, and, if both disclaimed jurisdiction, the claimant could thereafter in a suit by the United States assert full compliance with 28 U. S. C. 2406 (cf. *Skinner & Eddy* v. *McCarl*, 275 U. S. at 4). But there is in fact no such dilemma here, for GSA in 1949 advised petitioners that their claims had been dis-

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nent materials relevant thereto are wholly documentary. *Orvis* v. *Higgins*, 180 F. 2d 537, 539, n. 6 (C. A. 2), certiorari denied, 340 U. S. 810; see also 5 Moore's *Federal Practice* (2nd ed.), par. 52.04; cf. *United States* v. *Gypsum Co.*, 333 U. S. 364, 395.

In this connection, it may also be noted that petitioners' suggestion that the court below erred (Pet. 4) in concluding that subsection (d) "is prospective by its terms" (Pet. 10–11) is of little consequence. While it would appear that subsections (c) and (e) of Section 30 of the Surplus Property Act of 1944 (58 Stat. 782, former 50 U. S. C. App. 1639 (c) and (e), Appendix, p. 10, *infra*), give exactly the same authority as Sections 204 (d) and (g) of the later 1949 Act, this circumstance, if true, does not destroy the primary basis for the Court of Appeals' ruling.

allowed because of lack of authority to adjust and settle them (see Pet. App. 11), and at that time petitioners still had an ample opportunity to file their claims with the Comptroller General, since ten years is allowed for the filing of such claims. 31 U. S. C. 71a and 237. Indeed, petitioners could have complied with 28 U. S. C. 2406 even after suit had been filed. *United States* v. *Hawkins*, 10 Pet. 125.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1957.

APPENDIX

Subsections (c) and (e) of Section 30 of the Surplus Property Act of 1944 (58 Stat. 782, former 50 U. S. C. App. 1639 (c) and (e) (1946 ed.)), which were repealed when the Federal Property and Administrative Services Act of 1949 was enacted (63 Stat. 389), provided:

> (c) To the extent authorized by the Board, any Government agency disposing of property under this Act (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn.
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> * * * * *
>
> (e) Where the disposal agency acquires or retains any mortgage, lien, or other interest as security in connection with any transfer or disposition or [sic] property under this Act, the disposal agency shall retain, preserve, and manage such security and may enforce and settle any right of the Government with respect thereto in such manner and upon such terms as it deems in the best interest of the Government. The Board may prescribe regulations to govern the exercise of the authority granted under this subsection.

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